In the Supreme Court of the United States

OCTOBER TERM, 1970

Nos. 1774, 7130, 7137, 7153, 7154 and 7166

WILLIAM CRANDALL, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON MOTIONS FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE PETITIONS FOR WRITS OF CERTIORARI

OPINION BELOW

The opinion of the court of appeals is reported at 438 F. 2d 858 (C.A. 5).

JURISDICTION

The judgment of the court of appeals was entered on January 13, 1971. A petition for rehearing was denied on March 20, 1971. Mr. Justice Black extended the time for filing the petitions for writs of certiorari in Nos. 1774, 7137, 7130, and 7154 (petitioner Marmorstein only), to May 29, 1971, and on May 28,

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1971, all the petitions were filed.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether indigent petitioners were improperly denied copies of a daily trial transcript.

2. Whether petitioners were denied a fair trial by the use of charts summarizing complex transactions.

3. Whether the trial judge's explanation of his refusal of the jury's request to have the charts in the jury room was prejudicial error.

4. Whether the court of appeals' examination of the charts was proper.

5. Whether the trial court properly refused to give an instruction requested by petitioner Fanning.

6. Whether the trial judge intervened in the trial to an extent constituting a denial of due process.

7. Whether petitioners were denied an opportunity to develop the issue of alleged electronic eavesdropping.

8. Whether the trial court's charge constituted a comment on petitioners' failure to testify.

STATEMENT

Petitioners and others were charged in an eight-count indictment with conspiracy to misapply bank funds and various substantive acts of misapplying bank funds and making false entries in bank records in violation of 18 U.S.C. §§ 656, 1005. Three defendants pleaded guilty. After a jury trial in the

[1] No application for extension of time was received from petitioners Fanning, Schikevitz and Von Zamft, and their petitions are therefore out of time under Rule 22(2).

United States District Court for the Southern District of Florida, one defendant was acquitted and the remaining nine, including petitioners, were convicted on the conspiracy count and various substantive counts.[2] Petitioners were sentenced as follows: Crandall, five years' probation; Gordon, four years' imprisonment; Fanning, two years' imprisonment; Marmorstein, four years' imprisonment; Von Zamft, five years' imprisonment; Schikevitz, five years' probation; Dixon, two years' imprisonment. The court of appeals affirmed in a comprehensive opinion reported at 438 F. 2d 858 (C.A. 5).

The trial lasted four and one half weeks, during which testimony of sixty witnesses was received and 650 documents were entered in evidence.

The facts of the case are set forth in the opinion of the court of appeals. They showed a complex scheme by which the conspirators gained control of the Five Points National Bank and misapplied its assets to their own benefit. Loans of several hundred thousand dolars were fraudulently arranged during the four and one half months the conspirators controlled the bank. Only a small portion was recovered.

ARGUMENT

1. The thorough opinion of the court below fully answers petitioners' contentions regarding the use of charts (Questions 2 & 3, see App. A in No. 7154, pp. 37–41) the conduct of the trial (Questions 6 & 7, see

[2] Another of the co-conspirators, Dubin, has filed a petition for certiorari to which the government has already responded, *Dubin v. United States*, No. 7007, this term.

App. A in No. 7154, pp. 5–15) and the comments of the judge (Question 8, see App. A in No. 7154, pp. 41–42). We deal here with the remaining issues.

2. Petitioners contend[3] that it was error for the trial court to refuse to order copies of a daily transcript prepared for the government at government expense, for the indigent defendants. As the court of appeals pointed out, however, petitioners were afforded an opportunity to use the government's copy on a daily basis (T. 3A–30—3A–32),[4] and the government was not constitutionally required to provide additional copies at government expense for their exclusive use. App. A in No. 7154, p. 37. See *Leyvas* v. *United States*, 264 F. 2d 272, 277 (C.A. 9), certiorari denied, 359 U.S. 936.

Nor was there any statutory right to a daily transcript under the Criminal Justice Act, 18 U.S.C. 3006 A(e). It was within the trial judge's discretion to determine that petitioners' rights were adequately protected by the availability of the government transcript. Unlike *Dennis* v. *United States*, 384 U.S. 855, this is not a case where the determination of usefulness by the trial judge has been substituted for that of an advocate. Not only were counsel present throughout the trial to observe the testimony, but, in addition, the transcript was available for inspection

[3] This contention applies only to the petitioners who were indigent at the trial: Gordon, Dixon, Fanning and Schikevitz.

[4] "T" refers to the trial transcript which is on file in this Court in a companion case, *Dubin* v. *United States*, No. 7007, this Term, certiorari denied, June 21, 1971.

on a daily basis.[5] The trial court also indicated that witnesses would be made available to be recalled by petitioners if requested.

Indeed petitioners are unable to show any prejudice resulting from the procedure followed by the trial court. On one occasion, apparently due to a failure of communication, counsel for petitioner Gordon informed the court that the transcript had not been available for his use one morning; the government attorney responded that he had kept it available until 11:30 the preceding evening waiting for someone to use it. (T. 240–241). Petitioner Gordon also notes (Pet., No. 7130, 7) that the government's copy of the transcript was not available during the weekend preceding summation (T. 3749). In neither instance is any showing of prejudice made.

3. At the request of the court of appeals, the government forwarded copies of the challenged charts to that court for its use in considering petitioners' appeal. Petitioners contend (Question 4 *supra*) that this was prejudicial error because it amounted to deciding the case on material outside the record. The rule that appellate courts will not consider matters outside the record because the trial court has not had an opportunity to pass on them has no applicability here. The trial court did rule on the use of the charts. They were

[5] In cases cited by petitioner the attorneys never received the transcript to which they claimed to be entitled. See *Little* v. *Turner*, 402 F. 2d 495, 498 (C.A. 10), and *Peterson* v. *United States*, 351 F. 2d 606 (C.A. 9); *Roberts* v. *LaVallee*, 389 U.S. 40, and *United States ex rel. Wilson* v. *McMann*, 408 F. 2d 896 (C.A. 2).

introduced into the record as a court exhibit and marked for identification as a government exhibit. (T. 2960–2962.) The court of appeals pursued the logical and proper course by obtaining copies of the charts when petitioners, who were challenging the propriety of their use, failed to have them made part of the record on appeal. Cf. *Washington* v. *United States*, 401 F. 2d 915, 919–920, n. 19 (C.A.D.C.).

4. Petitioner Fanning contends (Question 5, *supra*) that the trial court improperly refused to give the following jury instruction (Pet. No. 7153, p. 3):

> You are instructed that the fact that a Defendant in this case was indebted to Five Points National Bank of Miami on January 11, 1966, is not evidence of the guilt of that Defendant of the charges made in the Indictment. This is so even if the debt to the Bank has not been reduced at all up to the present time.

Although refusal to give a similarly worded instruction was held to be error in *Peightel* v. *United States*, 49 F. 2d 235, 238 (C.A. 8), the alleged indebtedness in *Peightel* was completely irrelevant to that case.[6] Here, on the other hand, the evidence of the loan and the failure to repay was directly relevant to the charges, and the evidence was admitted without objection. *Peightel* thus is not in point.

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[6] In cross examining character witnesses of the defendant in that case, the government attorney repeatedly asked if they were aware that Peightel was indebted to the bank at the time it closed. There was abolutely no connection between the alleged indebtedness and the transaction for which Peightel had been charged, and the court noted that evidence of such a loan would not have been admissible for any purpose.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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